

Internal Revenue Service

Number: **200949010**

Release Date: 12/4/2009

Index Number: 7701.00-00, 9100.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B1

PLR-112784-09

Date:

August 31, 2009

Legend

X =

Y =

Exempt Organization =

Building =

Address =

Date 1 =

Date 2 =

Year 1 =

State =

City =

Dear _____ :

This letter responds to a request, dated March 6, 2009, written on behalf of Taxpayer X, requesting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations to file an election to be treated as a corporation for federal tax purposes under § 301.7701-3(c). Additionally, X requests an extension under § 301.9100-3 to make an election not to be treated as a tax-exempt entity under § 168(h)(6)(F)(ii) of the Code. A tax-exempt controlled entity that makes an election under § 168(h)(6)(F)(ii) can avoid limitations on the rehabilitation credit that otherwise would be imposed by § 47(c)(2)(B)(v)(I).

FACTS

Based on the information submitted and representations made within, the relevant facts are as follows. On Date 1, X was organized under State law as a limited liability company. X uses the accrual method of accounting and the calendar year as its taxable year. X is wholly owned by Exempt Organization, which has received a determination that it is a tax-exempt organization described in § 501(c)(3).

Exempt Organization formed X to act as the managing member of Y. Y is a partnership for federal tax purposes and owns, and is engaged in the rehabilitation of, Building, located at Address in City, State. Building is a certified historic structure and the rehabilitation of Building is intended to qualify for the § 47 rehabilitation tax credit. The other members of Y are taxable investors.

X filed a federal income tax return for Year 1, the year in which Building was placed in service, but failed to make the election under § 168(h)(6)(F)(ii) not to be treated as a tax-exempt entity on that return. In addition, on or about Date 2, X discovered that it had not timely filed an election to be treated as an association taxable as a corporation effective Date 1 for federal tax purposes. Because it had not done so, under the applicable regulations, X was considered an entity disregarded from Exempt Organization for federal tax purposes and, therefore, Exempt Organization was considered a partner in Y.

After X realized that it had not timely filed the two elections, it requested relief under § 301.9100-3 to make an election to be treated as an association taxable as a corporation effective Date 1, as well as relief to make the election provided for under § 168(h)(6)(F)(ii) effective for Year 1.

From the affidavit and other materials submitted it is clear that X at all times intended to make the § 168(h)(6)(F)(ii) election. Upon discovering its failure, X promptly sought an extension of time in which to file the election. Moreover, X represents that it

has acted reasonably and in good faith, that granting relief will not prejudice the interests of the government, and that it is not using hindsight in making either election.

LAW AND ANALYSIS

Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an "eligible entity") can elect its classification for federal tax purposes. A "business entity" is an entity recognized for federal tax purposes that is not properly classified as a trust under § 301.7701-4 or otherwise subject to special treatment under the Code. Section 301.7701-2(a). An eligible entity with a single owner can elect to be classified either as an association (and thus a corporation under § 301.7701-2(b)(2)) or as an entity separate from its owner.

Section 301.7701-3(b)(1)(ii) provides that unless a domestic eligible entity elects otherwise, the entity is disregarded as an entity separate from its owner if it has a single owner.

To elect to be classified other than as provided in section 301.7701-3(b), an eligible entity must file Form 8832, *Entity Classification Election*, with the designated service center. Section 301.7701-3(c)(1)(i). An election can be effective on the date specified on the Form 8832 or on the date filed if no such date is specified. The effective date specified on the Form 8832 cannot be more than 75 days prior to the date the election is filed. Section 301.7701-3(c)(2)(iii).

Section 47(a)(2) of the Code provides a rehabilitation credit for 20 percent of the qualified rehabilitation expenditures (QRE) with respect to any certified historic structure.

Section 168(h)(6)(A) provides that, for purposes of § 168(h), if any property which is not tax-exempt-use property is owned by a partnership which has both a tax-exempt entity and a nontax-exempt entity as partners and any allocation to the tax-exempt entity is not a qualified allocation, then an amount equal to such tax-exempt entity's proportionate share of such property shall be treated as tax-exempt use property. Under § 47(c)(2)(B), expenditures allocable to the portion that is tax-exempt use property (within the meaning of § 168(h)) are not QRE.

Section 168(h)(6)(F)(i) provides generally that any tax-exempt controlled entity shall be treated as a tax-exempt entity for purposes of § 168(h)(5) and (6). However, under § 168(h)(6)(F)(ii), a tax-exempt controlled entity can elect not to be treated as a tax-exempt entity. Such an election is irrevocable and will bind all tax-exempt entities holding an interest in the tax-exempt controlled entity.

Section 301.9100-1(b) of the Procedure and Administration Regulations defines the term “regulatory election” as including any election the due date for which is prescribed by a regulation.

Section 301.9100-7T(a)(2)(i) requires an election under § 168(h)(6)(F)(ii) to be made by the due date of the tax return for the first taxable year for which the election is to be effective. Thus, the § 168(h)(6)(F)(ii) election is a regulatory election.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue has discretion to grant a reasonable extension of time to make a regulatory election.

Section 301.9100-1 though § 301.9100-3 provides the standards that the Internal Revenue Service will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered in § 301.9100-2) will be granted when the taxpayer provides evidence (including affidavits) to establish that the taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer--

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Under § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer--

- (i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;

- (ii) was fully informed of the required election and related tax consequences, but chose not to file the election; or
- (iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c) provides that the Service will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. The interests of the government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made.

CONCLUSION

Based solely on the facts submitted and representations made, we conclude that, with respect to X's failure to timely elect to be treated as an association taxable as a corporation effective Date 1, the requirements of § 301.9100-3 have been satisfied. Accordingly, X is granted an extension of time of sixty (60) days from the date of this letter to elect to be treated as an association for federal tax purposes, effective Date 1. The election should be made by filing Form 8832 with the appropriate service center. A copy of this letter should be attached to the election.

In addition, we also conclude that the requirements of § 301.9100-3 have been satisfied with respect to X's failure to make the election under § 168(h)(6)(F)(ii) for Year 1. Accordingly, X is granted an extension of time of 60 days from the date of this letter to file an amended return for Year 1 making the election under § 168(h)(6)(F)(ii). X should attach this letter to its amended return.

Although this office has not verified any of the material submitted or facts assumed in support of the request for ruling, they are subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, this letter does not rule on whether X is entitled to claim the rehabilitation credit under § 47(a).

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the power of attorney on file with this office, a copy of this letter will be sent to your authorized representative.

Sincerely,

Curt G. Wilson

Curt G. Wilson
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures (2)
Copy of this letter
Copy for section 6110 purposes

cc: